IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Gordhan Das through his Legal Representatives **vs.** Som Dutt

S.B. Civil Second Appeal No. 284/94 against the judgment and decree dated 15.9.1994 passed by the learned Addl. District Judge, Bikaner in Civil Appeal No. 16/94.

Date of Judgment: May 09, 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Manoj Bhandari & Mr. Sushil Bishnoi for the appellants.
Mr. R.R.Nagori, Mr. Alkesh Agarwal and Mr. S.D.N.Bhatt for the respondents.

BY THE COURT:

This appeal is against the judgment and decree passed by the first appellate court dated 15.9.1994 by which the first appellate court reversed the decree of dismissal of the suit of the plaintiff dated 28.11.1990.

Brief facts of the case are that the plaintiff initially filed Civil Original Suit No.338/78 for eviction of the same tenant-appellant, which according to the plaintiff, as per plaint allegation, was dismissed by the trial court on 25.9.1978 after

giving benefit of first default to the tenant. The defendant in his written statement submitted that in fact the said earlier suit was filed for eviction of the appellant-defendant-tenant on the ground of same personal bona fide need for which the present suit has been filed. It is also specifically stated in the written statement that in earlier filed suit no.338/78 the plaintiff also took a plea that the plaintiff wants to construct a stair-case within the suit premises. Said suit was withdrawn unconditionally and, therefore, the plaintiff's suit was dismissed on 25.9.1978 as withdrawn. The plaintiff did not choose to controvert these facts by filing rejoinder to the written statement of the defendant. However, when the defendant took another plea by amendment in the written statement by incorporating the fact that during the pendency of the suit, the plaintiff got possession of one shop from one Magan Lal Pareekh. That shop has been included in the adjoining shop where plaintiff's son Om Prakash was doing business. The present suit as well as the earlier suit for eviction were filed for the need of said Om Prakash also. Then the plaintiff filed rejoinder to the written statement of the defendant's amended written statement. In the rejoinder, the plaintiff only took the plea that the facts stated by the defendant are wrong and

further stated that the defendant-plaintiff did not disclose when Magan Lal vacated the shop and handed over possession to the plaintiff. It will be worthwhile to mention here that there is no specific denial that during pendency of the suit that Magan Lal did not vacate any shop of the plaintiff. Be it as it may be, the trial proceeded to determine the issue of personal bona fide need of the plaintiff and his sons. The plaintiff's present case was that the suit premises is required for the need of the plaintiff's sons Om Prakash and Ashok Kumar and for the purpose of constructing a stair-case for reaching to the roof. The defendant as stated above, contested on all facts in the trial court and issues were framed and thereafter after evidence of the parties, the trial court dismissed the suit of the plaintiff by judgment and decree dated 28.11.1990. The trial court was also of the view that during the pendency of the suit, the plaintiff let out the shop to other tenant despite his claim for shop for the need of plaintiff's sons.

The appellate court, while allowing the appeal of the landlord-respondent, vide judgment and decree dated 15.9.1994, held that the trial court failed to appreciate that when the one shop was vacated by the plaintiff's tenant, that was let out to one Dharam Chand Bothra and that was during the period of internal

emergency and at that time, the plaintiff was behind the bars. In that situation, the plaintiff could not have established his sons in the suit shop nor the plaintiff's sons were in position to do the business in the shop. Therefore, if in absence of the plaintiff, any shop was let out to said Dharam Chand Bothra then on this ground, it cannot be said that need of the plaintiff was not there. However, it is admitted case that though the suit was filed for the need of plaintiff's two sons Ashok Kumar and Om Prakash but so far as Ashok Kumar is concerned, he joined the service and, therefore, the need of said Ashok Kumar came to an end and, therefore, the plaintiff did not sought any decree of eviction of the appellant-tenant on the ground of need of Ashok Kumar.

It will be worthwhile to mention here that the first appellate court despite plaintiff's clear statement on oath that by part of the premises, the need of the plaintiff cannot be satisfied, passed the decree for partial eviction of tenant on the ground that during trial, the defendant agreed for partial eviction and at that time the plaintiff-landlord was not agreeable but in appellate court, the plaintiff agreed for decree of the part of the premises, then the defendant denied. In that situation, according to the appellate court, both the parties on one or another occasion, agreed that

their need can be satisfied by part of the suit premises and, therefore, the appellate court granted the decree for eviction of the tenant from the part premises. Hence this second appeal by the tenant being aggrieved against the judgment and decree passed by the first appellate court dated 15.9.1994.

Following substantial questions of law were framed by this Court while admitting this Appeal on 15.11.1994:-

> " (1) *Whether the first appellate court was justified in the facts and circumstances of the case in reversing the finding as to banafide reached by the trial court.*
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> *(2) Whether the first appellate court was justified in ignoring the finding reached by the trial court on the question of comparative hardship and passed the judgment without discussing the matter at all.*
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> *(3)* Whether the first appellate court has erred in not considering the situation of the tenant's premises and feasibility of its partition.

During the pendency of this appeal, an application has been filed by the appellant under Order 41 Rule 27,C.P.C. on 25.9.2001. By this application, the appellant sought to produce additional evidence and which is the certified copy of the suit filed by the plaintiff's son Om Prakash against his tenants Punam Chand and

Man Mal, for their eviction from the shop let out to them. In the suit, the plaintiff's son Om Prakash sought decree for eviction of these tenants on the ground of his personal bona fide necessity for the shop which was in possession of said tenants Puman Chand and Man Mal. The plaintiff's son in his suit claimed that by one family settlement, he became owner/landlord of the said tenants' premises. The appellant also submitted certified copy of the family settlement dated 1.4.1984 which was filed by sad Om Prakash in his suit filed against Punam Chand and Man Mal. The learned counsel for the appellant submitted that it is clear from the document dated 1.4.1984, which is an admitted document, that the entire properties of Som Dutt have been partitioned by way of family settlement. According to the learned counsel for the appellant, the plaintiff and his sons very cleverly drafted the family settlement in such a manner that without disclosing the shop in dispute, the properties stand partitioned in such a way so that every son of the plaintiff gets separate property in the house as well as in the shop which is in front of the house. The plaintiff cleverly did not mention the shop in dispute in the family settlement dated 1.4.1984 but by implication it can be inferred that the shop in dispute went in the share of Ashok Kumar. It is

submitted that that clearly shows that the suit was filed mala fidely from beginning and malafide continued thereafter. It is submitted that the appellant had no knowledge of the said suit earlier and the suit was filed by Om Prakash in the year 1993 after dismissal of the plaintiff's present suit by the trial court in the year 1990.

The respondent-landlord submitted written reply to the application filed under Order 41 Rule 27 C.P.C. In reply, the plaintiff did not choose to deny filing of the suit by Om Prakash nor the family settlement dated 1.4.1984. However, according to the plaintiff, in the family settlement, the shop in question has not been included and, therefore, according to the learned counsel for the respondent, the shop in dispute remained only with plaintiff Som Dutt and therefore, he continued to be the owner of the suit property and Om Prakash is son of plaintiff Som Dutt and, therefore, the choice of the landlord cannot be doubted when he thinks it proper to give this shop to his son Om Prakash for his business. It is also submitted that the family settlement can be read as it is and it cannot be read in the manner in which the appellant-tenant wants to read. When a property has not been included in the family settlement then that cannot be included by

implication. It is also submitted that the appellant-tenant never denied title of the property of plaintiff Som Dutt and today also is not denying title of plaintiff Som Dutt. In that situation, inspite of partition of the property of Som Dutt and his sons, the title of the property still vests in Som Dutt to the property in dispute. It is also submitted that filing of suit by Om Prakash against other tenant on the ground of personal bona fide necessity is absolutely irrelevant because of the reason that mere filing of suit cannot tantamount to satisfaction of the need of the plaintiff's son Om Prakash. It is also submitted that we cannot anticipate at this stage that Om Prakash's suit will be decreed for eviction of the tenants. It is also submitted that in that suit, though filed in the year 1993, yet the evidence has not started, therefore, because of this reason, the decree which has already been granted by the court below, cannot be set aside.

So far as the merits is concerned, the learned counsel for the appellant vehemently submitted that the plaintiff filed one suit no.338/78 and that suit was on the ground of personal bona fide necessity of the plaintiff as well as his two sons and for the purpose of construction of stair-case from the shop in dispute. That suit was withdrawn by the plaintiff unconditionally and,

therefore, the plaintiff's suit was dismissed by the trial court by judgment and decree dated 25.9.1978. Thereby, the plaintiff abandoned his any claim on the ground of personal bona fide necessity. It is also submitted that in fact the present suit was barred by the principle of resjudicata.

The learned counsel for the appellant further submitted that the plaintiff as well as his witnesses clearly admitted that the shop of measurement of 6'x15' to 20' was vacated by the another tenant during the pendency of the suit and its possession was handed over to the plaintiff who let out the premises to one Dharam Chand Bothra. The learned counsel for the appellant pointed out that the first appellate court misread the evidence and because of that reason only, the first appellate court decreed the suit of the plaintiff. The first appellate court was under impression that the plaintiff's witness, the son of the plaintiff Om Prakash in his cross-examination, stated that the other shop was let out to Dharam Chand Bothra during period of emergency and at that time the plaintiff was behind the bar and, therefore, by that fact, it cannot be presumed that the plaintiff's need was not bona fide or the plaintiff had no need. In fact the plaintiff's son clearly admitted that the shop was let out to Dharam Chand Bortha in the year

1983. It is also submitted that during emergency period, the shop was let out to one Shri Bhansali and not to Shri Bothra. Shri Bhansali vacated the shop obviously in the same year 1983 and thereafter it was let out to Shri Bothra, as is clear from the statement of plaintiff's son. It is submitted that because of misreading of the statement of the plaintiff's witnesses, the finding of the trial court was reversed by the first appellate court.

It is also submitted that the document which is sought to be produced by the appellant under Order 41 Rule 27,C.P.C. are the admitted documents and,therefore, there is no need to prove those documents and it is matter of interpretation and drawing inference from the documents and, therefore, this Court even in second appeal, can examine the effect of the admitted documents which are the documents of the plaintiff himself. Therefore, the application under Order 41 Rule 27,C.P.C. may be allowed.

The learned counsel for the respondent opposed the said application on the ground that the documents placed on record are irrelevant. Learned counsel for the respondent also submitted that the question of plaintiff's need is question of fact and is based on evidence, therefore, this Court may not interfere in said finding of fact.

I considered the submissions of the learned counsel for the parties and perused the record.

So far as application under Order 41 Rule 27,C.P.C. is concerned, by this application the appellant-defendant-tenant wants to place the certified copy of the suit filed by the plaintiff's son Om Prakash for whose need the present suit has been filed by the plaintiff Som Dutt. Since Om Prakash himself has filed the suit for eviction of two tenants from adjoining shop then that document cannot be said to be irrelevant, however, its effect will be looked into. So far as document of family settlement dated 1.4.1984 is concerned, this document is also admitted document and, therefore, these two trustworthy documents can be admitted in evidence. However, as stated above, effect of these documents will be seen latter on.

So far as the contention of the learned counsel for the appellant that the plaintiff filed the earlier suit no.338/78 on the ground of personal bona fide necessity of the suit premises against the present tenant-appellant and that was on the ground of personal bona fide necessity of the plaintiff's two sons and for constructing a stair-case and this fact has not been denied specifically by the plaintiff. The plaintiff in his statement very

specifically pleaded that the plaintiff filed suit no.338/78 but that was dismissed after giving benefit of first default to the tenant-appellant. The plaintiff did not choose to place on record the copy of the plaint, written statement and the copy of the judgment despite that he himself in his plaint mentioned the fact relating to the earlier filed suit. The defendant's plea in defence was that the suit no.338/78 was filed on the ground of personal bona fide necessity of these two very sons as well as for construction of a stair-case in the shop in dispute. Yet the plaintiff did not choose to rebut this fact by placing copy of his own plaint to show that the plea taken by the defendant is false. The burden was upon the plaintiff to disclose all the facts but he did not disclose the true facts about earlier suit no.338/78, then in fact the court below should have drawn adverse inference against the plaintiff because of the reason that the plaintiff, after filing one suit, wanted to evict the same tenant from the same premises within a short period of about one year and two months,then he should have disclosed the complete facts. Since there was plea of the defendant that the suit was on the ground of personal bona fide necessity then also it was the duty of the plaintiff to rebut it. Be it as it may be. Once the suit is filed and is withdrawn

unconditionally, then even if the principle of resjudicata may not apply in strict sense because there is no adjudication on issue but at the same time, the plaintiff is debarred from seeking decree on the same grounds on the principle of abandonment of claim and this view finds support from the judgment delivered in the case of Hari Ram v. Lichmania and ors (AIR 2003 (Raj.) 319). Any party before the court of law, claiming any relief if unconditionally withdraws his claim then in facts and circumstance, may amount to abandonment of claim. The two courts below have not very carefully considered this aspect of the matter. Otherwise the plaintiff's suit could have been dismissed only on this ground.

So far as the finding of fact of the first appellate court that the plaintiff let out one of the shops to Shri Bothra during emergency period is concerned, that is because of the total misreading of the statement of the plaintiff's own son Om Prakash. The plaintiff's son Om Prakash very specifically stated that one shop was let out to Shri Bhansari during emergency and said shop was again let out to Shri Bothra only an year before the statement of plaintiff's son Om Prakash. The plaintiff's son Om Prakash's statement was recorded in the year 1984, then the the property let out to Shri Bothra was in the year 1983,much after the period of

internal emergency. That is the only basis on which the first appellate court reversed the finding of the trial court recorded on the question of personal bona fide necessity of the plaintiff. The consequential observations of the first appellant court that since the plaintiff was behind the bars and the suit shop was let out by plaintiff's son and the plaintiff's economic condition may not be in good that the plaintiff's son could have established his business, are only because of misreading of evidence of plaintiff and his sons. Therefore, the approach of the first appellate court was absolutely erroneous in the facts and circumstances of this case. As stated above, it is not a case wherein by appreciation of evidence, the finding of fact is sought to be reversed by this Court in second appeal but it is a case of misreading of material evidence and it is a case of the appellant-tenant that a very foundation for passing the decree is wrongly recorded by the first appellate court. The appellant correctly said so which is clear from the finding recorded above.

In view of the above reason, though the application under Order 41 Rule 27, C.P.C. looses its significance but for the purpose of finding out the conduct of the plaintiff, the documents are very much relevant. At this place, the plaintiff's family settlement is

very relevant. The learned counsel for the respondent-landlord vehemently submitted that property which has not been included in the family settlement cannot be included by implication only. The learned counsel for the respondent also admitted that the respondent in his plait clearly stated that he has four shops. For the reason best known the plaintiff and his sons that in the family settlement it is mentioned that there are only three shops and only one shop which is subject matter in this suit alone has been left out. Not only this that the only plaintiff's ancestral property alone was dealt with in the family settlement dated 1.4.1984 but even the plaintiff's own property purchased by the plaintiff from U.I.T. on 31.5.1973 has been dealt with and by this very settlement, said property was given to plaintiff's wife. The learned counsel for the plaintiff-respondent could not explain where the forth shop is situated, whether it was in the property of deceased Chhoga Lal or in the property which was given to plaintiff's wife Shanti. Be it as it may be, the learned counsel for the plaintiff-respondent only could say that the property that is the shop in dispute alone has not been dealt within the family settlement dated 1.4.1984 and, therefore, was not subjected to partition and, therefore, remained with the plaintiff Som Dutt. If this statement is examined then also it will

be worthwhile to mention here that in the family settlement, not only that the shop in dispute alone has been suppressed but in the entire family settlement, it is no where mentioned that the shop in dispute still shall remain in the share of the plaintiff. Apart from this, it will be relevant to mention here that in para 6 of the family settlement dated 1.4.1984 it is mentioned that the entire property of deceased Chhoga Lal, who was father of the plaintiff, has been divided by way of family settlement in the presence and consent of plaintiff and his wife. Then in that situation, there is force in the submission of the learned counsel for the appellant that in fact to avoid any adverse effect on this suit, there is no reference of only one shop and for which the plaintiff filed the suit for eviction of present tenant-appellant and, therefore, that supports the contention of the appellant that from beginning, there was no bona fide of the plaintiff in seeking the decree for eviction of the appellant-tenant. The family settlement has been considered because of the reason that the family settlement document is not denied by the defendant.

In view of above, the finding of the first appellate court on the issue of personal bona fide necessity of the plaintiff is vitiated because of misreading of statement of plaintiff's own son Om

Prakash and the finding is also perverse. The substantial question of law no.1 is decided in favour of the appellant.

Since the plaintiff's need is not found bona fide, rather say the suit has been filed without there being any need of the plaintiff, the rest of the issues about the comparative hardship as well as the situation of the rented premises became irrelevant.

Consequently the appeal of the appellant is allowed and the judgment and decree of the first appellate court dated 15.9.1994 is set aside. The suit of the plaintiff stands dismissed.

(**PRAKASH TATIA),J.**

mlt.